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Nos. 00-832 and 00-843

IN THE
Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE SITE OWNERS AND MANAGERS ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DENNIS P. CORBETT
H. ANTHONY LEHV *
LEVENTHAL, SENTER
& LERMAN P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

* Counsel of Record

Counsel for the Site Owners and Managers Alliance of the Personal Communications Industry Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

The Site Owners and Managers Alliance, a membership division of the Personal Communications Industry Association, will address only the second of the two questions certified for consideration by the Court:

> Whether the provisions of the Pole Attachments Act apply to the attachment of wireless equipment as well as to the attachment of wireline equipment.

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PRELIMINARY STATEMENT [1]

Pursuant to Sup. Ct. R. 37, the Site Owners and Managers Alliance ("SOMA"), a membership division of the Personal Communications Industry Association ("PCIA"), respect-

[1] Pursuant to Sup. Ct. R. 37.6, SOMA certifies that this brief was authored entirely by counsel for SOMA and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

fully submits this brief, as *amicus curiae*, in support of Respondents. In accordance with Sup. Ct. R. 37.3(a), this brief is accompanied by the written consent of all parties.

INTEREST OF SOMA

SOMA is comprised of companies that build, acquire, manage and develop communications towers, antenna structures and other edifices where wireless equipment can be sited. Within its members are four of the five largest national builders and managers of commercial communications towers. PCIA is a prominent national trade association for the personal communications industry. Its mission is to promote the development and continued vitality of personal wireless products, manufacturers and providers. PCIA's general membership includes common carrier and private paging companies; businesses licensed by the Federal Communications Commission ("FCC") to offer two-way mobile wireless service, paging and messaging systems, mobile data products, and network services; FCC licensees of private, wireless systems, including transportation, insurance, utilities and business radio systems; and developers of "third generation" wireless technology and content.

SOMA believes that the FCC's ruling, that 1996 amendments to the Pole Attachments Act ("PAA"), authorized the FCC to include wireless communications attachments within the scope of its regulatory authority, is erroneous. The FCC's analysis mistakenly presumes that utility poles comprise a significant portion of wireless siting facilities and that these utility poles are a "bottleneck" constraining the siting of wireless equipment. The FCC's assumption is factually unsupported. There is a highly competitive market devoted to siting wireless equipment and SOMA's members are principal competitors in this market. By upholding the FCC's analysis of the PAA, the Court would sanction unnecessary and intrusive government regulation in an area where the federal government does not

have a substantial interest. Such regulation goes impermissibly beyond the PAA's purpose, to foster a competitive environment, to ensure that limited facilities are available at reasonable rates, and to eliminate monopolistic control over elements essential to construction of a wired network. There is no bottleneck for wireless communications equipment sites as there is for wireline attachments by cable systems and telecommunications carriers that must have access to utility poles in order to provide services to the public. In fact, wires used by wireless communications providers to connect to the public switched telephone network benefit from PAA provisions granting wires open access to the utility poles at regulated rates.

As the association which represents a majority of the publicly-traded companies in the private tower ownership industry, SOMA has extensive knowledge that directly pertains to the question presented in this case and that has not already been submitted to the Court. SOMA may, therefore, be uniquely helpful to the Court in exposing the flaws in the FCC's construction of the PAA and explaining the harmful consequences of that holding.

SUMMARY OF ARGUMENT

When a federal agency construes a statute and the statutory language and intent of Congress are clear, the agency has no discretion to change the meaning, but instead "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*"). The Eleventh Circuit, in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted in part*, __ U.S.__, 121 S. Ct. 879 (2001), held that in construing the Pole Attachments Act ("PAA"), the FCC failed to observe the clear intent of Congress, as required under *Chevron*, and impermissibly read the PAA to encompass wireless equipment attachments, as well as wired attachments of telecommunications providers and cable

systems. *Id.* at 1273 and n. 21. Soma respectfully asserts that this Court should affirm the Eleventh Circuit's judgment.

Congress enacted the PAA in 1978. *See* Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33. It was a narrowly-drawn statute that delegated to the FCC the authority to ensure reasonable rates for cable systems seeking to attach their cables to poles owned or controlled by "utilities." The PAA granted the FCC the right to regulate "any attachment" by a cable system. Pub. L. No. 95-234, sec. 6, § 224(a)(4), 92 Stat. 33, 35 (1978) (codified, as amended, at 47 U.S.C. § 224(a)(4)). It was apparent, however, using common sense and traditional principles of statutory construction, that in 1978 Congress intended the FCC only to regulate wire attachments.

From 1978 until Congress amended the PAA as part of the landmark, deregulatory Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) ("1996 Act"), there was apparently no dispute as to the carefully circumscribed character of the PAA. The 1996 Act amendments to the PAA extended its protections to "any attachment" by cable systems and telecommunications carriers. Pub. L. No. 104-104, § 703(3), 110 Stat. 56, 150 (1996) (codified at 47 U.S.C. § 224(a)(4)). There is no indication that by expanding the universe of entities whose wire attachments were to be regulated, Congress also intended, without otherwise modifying the statutory language, to fundamentally alter the scope of the PAA to regulate wireless attachments.

The FCC nevertheless interpreted the PAA to govern wireless equipment attachments. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6798-99 (1998) ("*PAA Order*"). Even if the 1996 Act amendments to the PAA could be deemed ambiguous with respect to wireless equipment

attachments, the FCC's interpretation is patently unreasonable and is not entitled to deference under *Chevron*. *See* 467 U.S. at 845. The PAA was enacted to eliminate "bottleneck" access to utility poles, rights-of-ways, and conduits that were critical to development of wireline communications systems. These essential facilities were, and are, controlled by "utilities." By contrast, the market for siting wireless equipment has long thrived and, in the absence of intrusive and unnecessary government regulation, is fiercely competitive. It is certainly not dominated by the "utilities" that are regulated by the PAA.

Rather, the chief competitors in this wireless facilities siting market are the members of SOMA and entities such as the Wireless Industry *Amici*.[2] These companies own or manage many of the towers, building walls and rooftops, church steeples, chimneys, smokestacks, water towers and other locations where wireless equipment can be attached. Mandating access to the facilities of "utilities" by wireless equipment users is not necessary and would thwart Congress's goal of deregulating the communications industry and encouraging a competitive marketplace, as expressed in the 1996 Act.

Common sense also confirms that the FCC erred by applying the PAA to wireless equipment attachments. The basic pole attachment rate formula imposed by Congress includes elements and concepts such as "usable space" that are not readily applicable to wireless equipment or siting facilities. See 47 U.S.C. § 224(d)-(e) (1994 & Supp. IV 1998). The differences between wireless and wireline equipment attachments are so stark that the two cannot

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[2] *See* Brief of Association For Local Telecommunications Services, AT & T Wireless Services, Inc., Teligent, Inc., Winstar Communications, Inc., Wireless Communications Association International and XO Communications as *amici curiae* in support of Petitioners.

readily be compared at all.[3] Yet, the FCC's interpretation of the PAA would awkwardly force the wireline market rate concepts onto the wireless market. The Eleventh Circuit correctly overturned the FCC's unjustified intrusion into the relationship between the utilities and wireless equipment users, and correctly decided that the FCC has no authority to regulate wireless attachments. The Eleventh Circuit's judgment should be affirmed.

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT GOVERN ATTACHMENTS OF WIRELESS EQUIPMENT TO UTILITY POLES.

This brief addresses a single issue before this Court: whether the provisions of the Pole Attachments Act ("PAA") govern attachments of wireless equipment to a "pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (1994). The FCC held that Congress intended to impose rate regulation on wireless equipment attachments when it amended the PAA to expand the universe of entities entitled to regulatory protection, from cable systems to all providers of telecommunications services. *PAA Order*, 13 F.C.C.R. at 6799.

This conclusion, offered by the FCC without analysis or support in its administrative record, contradicts the plain language of the PAA, is not supported by the legislative history and is inconsistent with Congress's goal of

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[3] A wireline attachment generally consists of cables or wires and associated equipment affixed to a pole. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 928 (D.C. Cir. 1993). The *PAA Order* aptly characterized wireless attachments as "includ[ing] an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." 13 F.C.C.R. at 6799.

encouraging natural market forces and competition in the communications industry. The Court should affirm the Eleventh Circuit's holding that the FCC erroneously interpreted the PAA to enlarge its regulatory reach.

A. Congress Only Intended The Term "Any Attachment" In The PAA To Encompass "Wire" Attachments.

Prior to the 1978 enactment of the PAA, the nationwide build-out of cable television systems was still in its infancy. Then, as now, cable systems depended on the ability to run many miles of cable to and from headends to subscribers' homes and businesses. Faced with prohibitive expense as well as an inability to obtain necessary local governmental consents to create an independent system of poles, ducts and conduits to support these wires, cable television systems leased space on poles from utility and telephone companies. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Because there were no reasonable siting alternatives, cable systems lacked bargaining power and alleged that they were forced to accept unreasonable terms offered by pole owners. *Id.*

Cable systems and Petitioner NCTA sought relief from the FCC. The FCC, however, concluded that it lacked the authority to regulate the pole attachment contracts between utility companies and cable systems because utility pole attachments were outside of the FCC's jurisdiction to regulate "all interstate . . . communications by wire or radio." *California Water And Tel. Co.*, 64 F.C.C. 2d 753, 758 (1977), *quoting United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

At least in part in response to the *California Water and Tel. Co.* decision, Congress enacted the PAA. The PAA was exceedingly narrow in scope and designed to remedy a single problem: allegedly unfair contracting practices by monopoly

providers of wireline siting facilities. To address this discrete governmental interest, Congress narrowly expanded the FCC's jurisdiction to ensure that in the absence of successful negotiations, a cable system could obtain, through the FCC's processes, reasonable rates and terms for its attachments to a limited group of utility poles owned by a carefully circumscribed set of utilities. 47 U.S.C. § 224(b)(1994).[4]

The PAA entitled cable systems to regulated rates for "any attachment" on poles covered by the PAA. In construing this critical statutory term, the meaning of the phrase "any attachment" cannot be determined in isolation, a true understanding of its meaning must be drawn from its contextual usage. *Deal v. United States*, 508 U.S. 129, 132 (1993). Despite the breadth of the phrase "any attachment," it is apparent that Congress, the cable industry, the FCC and utility companies universally understood that "any attachment" by a cable system meant any "wire" attachment. Congress is presumed to be aware of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Pursuant to this venerable principle, this Court may presume that Congress was cognizant of the industry's construction of the term "attachment" in 1978, and that it did not intend to apply the term "any attachment" to wireless equipment when it enacted or amended the PAA.

Other language in the original PAA buttresses this perception. In Section 224(d)(2), Congress obligated the FCC to calculate just and reasonable rates for pole

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[4] Poles owned by federal or state governments, private companies, railroads, cooperative utilities and poles not used "in whole or in part, for wire communications," were specifically excluded from the scope of the PAA. The owners of these poles either had not attempted to obtain unjust or unreasonable rates and terms, or they did not own a substantial number of poles to which attachments were made. S. Rep. No. 95-580, at 18-19, *reprinted in* 1978 U.S.C.C.A.N. 109, 126-27.

attachments with specific reference to "usable space" on a pole, which is defined as "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment." 47 U.S.C. § 224(d)(2) (1994). This concept, as recognized later by the FCC, *PAA Order*, 13 F.C.C.R. at 6799, is difficult, if not impossible to apply to the attachment of wireless equipment, which is fundamentally distinct and consumes much more pole space than wireline attachments. *See, infra*, at 20-22.

The legislative history of the PAA also is consistent with a restrictive scope of the phrase "any attachment." Prior to enactment of the PAA, the FCC asked Congress to modify the draft statute to eliminate language which would have permitted it to regulate "any attachment for wire communication." The FCC was concerned that this language was *too broad*, and that "under the proposed bill, the [FCC] might be involved in assuring just and reasonable rates for the *use of poles by not only cable television system operators but also by many other users of wire communications*." H.R. Rep. No. 1630, 94th Cong., 2d Sess. 2 (1976) (emphasis added). The FCC further opined that "if the legislative intent of the bill is merely to remedy pole attachment problems which are of importance to the cable television industry, then its application should be so limited, preferably by inserting the term 'cable television system' as defined by 47 C.F.R. § 76.5(a) in lieu of 'wire communication.'" H.R. Rep. No. 1630 at 30-31.

Congress incorporated this more "limited" language into the final version of the PAA, which strongly suggests not only that Congress and the FCC understood that the PAA applied only to wireline attachments, but that the PAA would apply only to a particular class of wireline attachments—those essential to the fledgling cable industry.[5] It is also

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[5] The Senate Report to the PAA explains that a pole attachment is "the occupation of space on a utility pole by the distribution facilities of a

difficult to conclude that the FCC perceived its own jurisdiction under the 1978 version of the PAA to encompass wireless equipment attachments, as there is no discussion of wireless equipment in the FCC rulemakings implementing the statute.

Using well-settled principles of statutory construction, SOMA has been unable to divine from the structure of the PAA, its language or legislative history, that in 1978 Congress intended the term "any attachment" to include wireless equipment attachments. The FCC's current reading of the PAA could be sustained only if there is clear Congressional intent from the 1996 Act amendments to expand the PAA to cover wireless equipment attachments. No such Congressional intent exists.

B. Congress Did Not Extend The PAA To Wireless Equipment When It Amended The PAA To Apply To Attachments By Telecommunications Carriers.

As part of the 1996 Act, Congress revised certain provisions of the PAA. These revisions did not create an ambiguity in the meaning of the term "any attachment." Consequently, there was no foundation under *Chevron* for the FCC to undertake its own unrestrained interpretation of the PAA at the expense of Congress's expressed will. 467 U.S. at 842-43.

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cable television system—coaxial cable and associated equipment—. . ." S. Rep. No. 95-580, at 2, *reprinted in* 1978 U.S.C.C.A.N. 109, 110. In the Section By Section Analysis, Congress recognizes that a "pole attachment" is the "attachment of the cables of a CATV system to a pole . . ." *Id.*, at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134. *See also Id.*, at 27, *reprinted in* 1978 U.S.C.C.A.N. at 135 (describing different rate structures which would reimburse a utility for costs "it would not have incurred but for the presence of CATV cables on its poles.").

The 1996 Act amendments modified the definition of a "pole attachment" from "any attachment by a cable television system" to "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (Supp. IV 1998).

The obvious result of this textual modification was to expand the universe of entities entitled to the benefit of regulated rates for wire attachments to include providers of telecommunications service as well as cable systems. In the 1996 Act, telecommunications providers were included in the historical protections that the cable industry had enjoyed under the PAA. If, however, the FCC's reading of the 1996 Act amendments is correct, then this simple textual change also would authorize a wholesale expansion of the universe of the *types of attachments* that are governed by the PAA, an expansion that would impose government regulation in the place of a competitive wireless equipment siting industry.

The addition by Congress of the words "or provider of telecommunications service" cannot sustain the weight of interpretation that the FCC would have it bear. In analyzing a statute and determining whether Congress "has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, a reviewing court does not confine itself to examining a particular statutory provision in isolation. Instead, the court views the provision in context and interprets the statute to create a coherent regulatory scheme. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1985). Importantly, a reviewing court is guided by common sense in determining Congress's will. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("*Brown & Williamson*").

There is plainly no evidence that Congress intended to alter the well-defined scope of the term "any attachment" in 1996, let alone to achieve an alteration by modifying an ancillary part of the definition of "pole attachment." *See City of Abilene v. FCC*, 164 F.3d 49, 52-53 (D.C. Cir. 1999). The definition of "telecommunications service," upon which the FCC's entire argument is premised, is a general definition, applicable throughout the Communications Act. It is not likely that Congress would have effected a sea change in the scope of the PAA merely by including in one of its definitions a term that applies generally throughout the Communications Act.[6] When Congress wanted a general provision of the Communications Act to have a different meaning in the PAA, as it did with "telecommunications carrier," it specifically set forth the alternate definition. *Compare* 47 U.S.C. § 153(44) (Supp. IV 1998), *with* 47 U.S.C. § 224 (a)(6) (Supp. IV 1998).

The change ascribed by the FCC to the new language also is not minor, nor does it involve mere "interstitial" gap-filling by the FCC. *See Brown & Williamson*, 529 U.S. at 159, *citing* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). The change strikes at the very heart of the justification for the PAA and would stretch the PAA far beyond its original purpose of regulating only a narrow class of wire attachments. As this Court stressed in *MCI Telecomms. Corp. v. FCC*, 512 U.S. 218, 229 (1994) ("*MCI*"), in the similar context of telephone rate regulation, it is improbable that Congress would leave to the FCC's *Chevron* discretion the determination of whether a portion of an entire industry would be regulated. *MCI*, 512 U.S. at 231. It is even less likely that Congress would have

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[6] The definition of "telecommunications service" is codified in Section 153 of the Communications Act, the general definition provision, and not in Section 224(a), where the remaining terms which apply specifically to pole attachments are defined.

achieved this substantial result through such a "subtle" revision as adding the term "telecommunications service," rather than through explicit language or without a clear indication in the legislative history. *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 613-614 (1991).

The dominant purpose of the 1996 Act was to promote competition by lowering entry barriers for entrepreneurs and to encourage existing telephone, utility and cable companies to compete in each other's core businesses. H.R. Rep. No. 104-204, at 47-55 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11-18. In this context, the amendment to Section 224(a)(4) of the PAA merely ensures that the wireline attachments of competitors to existing cable or telecommunications franchises (such as Open Video Systems) will be entitled to the same wire attachment rates and accessibility as are currently enjoyed by cable companies providing traditional cable video service or non-traditional telecommunications services. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

When Congress amended the PAA, it did not enlarge the original, circumscribed, meaning of the term "any attachment" to encompass wireless equipment attachments.[7] In the absence of such a modification, there was no basis for the FCC to divine a Congressional intent to transform the fundamental nature of the PAA—a statute governing wired attachments. The Eleventh Circuit appropriately rejected the FCC's interpretation of the 1996 amendments to the PAA and that conclusion should not be disturbed.

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[7] A restrained construction of "any attachment" is sensible because the PAA is not an expansively drawn act meant to encompass all types of conduct—it applies to a narrow class of attachments and to a circumscribed class of poles and ducts. *See Salinas v. United States*, 522 U.S. 52, 56-57 (1997).

II. THERE IS A COMPETITIVE WIRELESS EQUIPMENT SITING INDUSTRY; UTILITIES ARE NOT A "BOTTLENECK."

If there were an ambiguity in the scope of the definition of "any attachment" in the PAA, thereby entitling the FCC to undertake its own interpretation, a court is not obligated to defer to that interpretation if it is not reasonable. *See MCI*, 512 U.S. at 229. The FCC's construction of the phrase "any attachment" to encompass wireless equipment siting is not reasonable. It proceeds from a erroneous factual basis and defies common sense. The Eleventh Circuit rightly refused to defer to the FCC's construction of the statute.

A. A Competitive Market For Wireless Equipment Attachments Thrives Without Government Regulation Or Intervention.

The PAA was enacted to address a discrete problem, the use of monopoly market power by utility companies in negotiating contracts by which cable systems gained access to utility poles for their wires, cables and associated equipment. These poles are vital to the build-out of a wired cable system and, today, as in 1978, there is no functional equivalent. Because cable systems must attach wires to "utility" poles, government intervention into this impaired competitive market was both reasonable and necessary. As a practical matter, like cable system wires, telecommunications wires must be strung on an extensive network of poles in order deploy an adequate network.

There is no corresponding "bottleneck" for the siting of wireless antennas and associated equipment. Wireless communications equipment uses the spectrum to radiate signals through the air. Accordingly, users of this equipment enjoy ample siting alternatives. Wireless equipment may be sited on free-standing dedicated communications towers (including monopole towers and self-supporting towers),

building walls and rooftops, church steeples, chimneys, smokestacks, water towers, billboards, highway light structures, and, of course, utility poles.[8]

Precisely because wireless equipment can be sited in myriad locations, there is a thriving market for the provision of this space. In response to the increasing demand for sites for wireless equipment, an entire industry has developed to create, maintain, and service the siting of wireless equipment for telecommunications providers.

1. The Private Tower Industry Has Developed and Matured Through The Past Decade.

In the past decade, the ownership of communications towers—the principal location for wireless equipment attachments—has undergone a radical transformation. Until recently, virtually all towers dedicated to wireless communications or broadcast radio and television transmissions were owned by FCC licensees that concurrently utilized space on those towers. Those towers generally were built by tower construction companies for wireless equipment users or by the users themselves.

Since the early 1990s, this trend has begun to reverse. A variety of circumstances has contributed to this change. For example, under increasing pressure from their stockholders to maximize profits and trim costs, certain wireless service providers have resolved to focus on their core business of operating communications systems and have turned away

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[8] According to Fryer's TowerSource Market Report 2001, a reputable industry publication, there are an estimated 201,000 usable communications towers in the United States. Fryer's estimates that there are another 55,000 viable rooftop sites available for siting wireless equipment, as well as numerous other usable sites located on other edifices. *See* www.towersource.net/market_analysis.html.

from the ownership and construction of towers, becoming tenants instead.

Concurrently, tower construction companies and other non-FCC licensees recognized that the rapidly burgeoning wireless communications industry would need numerous antenna sites in order to build out their networks and that operating these sites could be a profitable-enterprise. These companies began to take the place of the carriers as major providers of wireless communications sites. SOMA's membership is comprised of these types of companies, whose core business is constructing, owning and managing dedicated communications towers and other locations where wireless equipment can be sited.

Today, SOMA's members own or manage thousands of sites nationwide and contribute essential facilities to the wireless communications infrastructure.[9] But SOMA's members are by no means the only competitors. Federal, state and local governments, numerous "mom and pop" tower companies, the Respondent utility companies, building and billboards owners, other independent owners of locations to which equipment can be attached and, significantly, the Wireless Industry *Amici*, *see* n. 2, *supra*, all compete for a share of the multi-faceted wireless equipment siting market. Tenants at wireless attachment sites include mostly cellular telephone, PCS, or paging companies, although other categories of tenants, including radio and television broadcasters, advanced wireless internet providers, businesses that transmit signals via spectrum between fixed antenna locations, and local government public safety users commonly rent space.

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[9] Fryer's estimates that tower companies of all sizes own approximately 40% of the estimated 201,000 communication towers nationwide, while communications carriers own roughly 18%, governmental units own about 10%, and utilities are estimated to own 3.4% (7,000) of those towers. *See* www.towersource.net/market_analysis.html.

The largest private tower companies are publicly held, with their stock traded on national exchanges. They tend to be heavily leveraged, at least in part so that available funds can be used to facilitate rapid growth. Unlike some other competitors for wireless attachments, SOMA's members' core business is generating revenue from leasing and managing communications sites. They also generate substantial revenues from network development—transactions in which a tower company partners with a wireless provider to develop an entire wireless network infrastructure in a particular locality. The tower company typically is intimately involved at each stage of the complex network design and planning.

The past five years have been particularly significant for SOMA's members and the wireless communications siting field, in general. During this period the FCC has authorized myriad new wireless services and granted additional licenses for traditional wireless providers. These licenses typically have strictly enforced and relatively abbreviated construction timetables. *See, e.g.*, 47 C.F.R. § 73.3598 (2000) (mandating three-year construction period for broadcast radio and television stations; extensions granted only in two narrow circumstances); 47 C.F.R. § 90.665 (2000) (establishing five-year construction deadline for 900 MHZ specialized mobile radio licensees). The wireless equipment siting industry has adapted and grown to offer service to these potential tenants.

Within SOMA's membership, there has been enormous growth and consolidation. The two principal growth strategies for SOMA's members are new construction and the acquisition of existing towers. Each of these strategies has been, and continues to be, heavily dependent on the participation of and, thus, the economic success of, wireless communications providers, including the Wireless Industry *Amici*.

Each year, SOMA's members construct thousands of new communications towers. These towers will generally accommodate six to eight users and follow one of two scenarios, referred to in the industry as "build to fill" and "build to suit."

A "build to fill" tower is erected before an "anchor" tenant or other users have contracted for space on the tower. These towers are sited in strategically desirable locations, usually along major and secondary roadways or in growing communities with high population density and significant commuting. Tower companies use sophisticated mapping and analysis techniques to choose "build to fill" sites.

Under a "build to suit" program, a tower company erects a structure at the behest of an "anchor" tenant, usually a wireless service provider, at a site determined by the tower company within a narrow radius (search ring) of a set of specific geographic coordinates designated by the provider. The tower company retains ownership of the facility and the exclusive right and discretion to add other tenants to the tower. A key component of most "build to suit" deals is that the wireless provider will negotiate a long-term lease for space on each tower at a reasonable rental rate as determined by the marketplace and the tenant. Tower companies may also negotiate for the right to build all of the towers needed for a particular wireless telecommunications provider's systems on a going forward basis. This continuing relationship is an important aspect of the businesses of SOMA's members.

The other common avenue for tower company growth is the acquisition of existing towers, by which a tower portfolio can be amassed rapidly. While most acquisitions involve only a few towers (because there are few entities that own extensive clusters of towers) the key acquisitions for SOMA's members are those from wireless communications providers, in which hundreds or thousands of towers are purchased at

one time. In fact, transactions with carriers, including the Wireless Industry *Amici*, have been the principal source of growth of the tower industry.[10]

In these arms-length transactions, wireless providers frequently negotiate beneficial terms, including long-term leases at reasonable rates and favorable location of their equipment at optimal heights on the towers. Consideration for these transactions may include stock or other interests in the tower company, which encourages the provider to continue to work with a particular tower owner.

In addition to their acquisition programs, SOMA's members enter into management and lease/sublease agreements with wireless providers. In these transactions, the wireless provider retains ownership of the towers and utilizes space on them, but the tower company contracts to oversee maintenance, upkeep and most other business and regulatory responsibilities, in exchange for the right to market and lease remaining space on the tower and retain all or most of the related rental income.[11] A similar scenario exists for the siting of equipment on non-tower structures such as building rooftops and municipal water towers.

The wireless equipment siting industry, exemplified by the members of SOMA, continues to mature and develop. It is a fiercely competitive industry and SOMA's members have invested heavily and devised complex business plans to survive competition not only from each other, but from numerous other tower owners.

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[10] Not only are wireless communications providers the primary tenants of SOMA's members, they are also significant competitors. Despite their recent sales of towers to SOMA members and other tower companies, wireless providers still own or control thousands of towers, *see* n. 9, *supra*, and are usually larger and better capitalized than tower companies.

[11] SOMA's members also manage towers, rooftops and other sites for building owners, utilities, and other land owners. These agreements usually parallel management agreements for traditional towers.

It is difficult to reasonably conclude, in light of these facts, that Congress could have intended, without so much as a word in the 1996 Act amendments to the PAA or the legislative history, to intrude on this competitive market in the manner suggested by the FCC's interpretation of the PAA. *MCI*, 512 U.S. at 231. Upholding the FCC's construction would create a particularly anomalous result, given that "utilities" (as defined in the PAA) are not major competitors in the market for siting wireless equipment. *See, e.g.*, n. 9, *supra*. Indeed, if wireless communications providers had believed that utility poles presented a bottleneck to the construction of their service areas, or that tower owners could present such a bottleneck, they never would have consigned their infrastructure inventory to third parties. Once again, the facts and common sense combine to highlight the FCC's gross misinterpretation of the PAA.

2. The Wireless Equipment Siting Industry Is Fundamentally Different From The Wireline Siting Industry.

The FCC's construction of the PAA suffers from another important flaw. The FCC assumes that concepts applicable to wire attachments easily translate to the wireless arena. But the two types of attachments are separate and distinct. For example, in amending the PAA, Congress specifically applied the concept of "usable space" to attachments by a "provider of telecommunications service" through the rate formula established in Section 224(e). 47 U.S.C. § 224(e)(2) (Supp. IV 1998). This concept is challenging to apply in the context of wireless equipment attachments because of significant differences between the size of wired and wireless attachments. *See PAA Order*, 13 F.C.C.R. at 6799 (acknowledging that applying rate rules to wireless attachments may engender "potential difficulties" because of "unusual requirements" of wireless equipment).

Traditional wire attachments (both cable and telecommunications) may consist of "coaxial or fiber optic cable and associated equipment. . . . The cables are lashed to an aerial support strand, which in turn is affixed to a single point within the section of the pole designated as 'communications space.'" *Texas Utils. Elec. Co. v. FCC*, 997 F2d 925, 928 (D.C. Cir. 1993). These cables are presumed to occupy one foot of "usable space" on a pole, although the actual wire only occupies approximately one inch, with the remaining space serving as protective clearance from electrical or other wires. *Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6466 (2000) ("*Attachment Order*").

By contrast, it is the experience of SOMA's members that the average wireless attachment consists of either a long "whip" antenna attached directly to a tower, or a panel, dish or horn-shaped antenna attached by grappling clamps to an arm mount or platform on a tower.[12] Each antenna has two separate associated cables. Coaxial cable attaches to the transmitter or other powering source, which is usually housed in a large cabinet or small building on site. A separate power cord from the antenna connects to the public electric system. Panel antennas are commonly at least four feet high (with an additional ten feet needed for separation due to signal interference concerns), while a "whip" antenna may be from six to twelve feet in length. Microwave dishes and horn

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[12] Many wireless communications systems need "line of sight" coverage for their services to function effectively. *See, e.g.*, 47 C.F.R. § 21.117 (2000) (domestic fixed public radio); 47 C.F.R. § 73.315 (2000) (FM broadcast stations). The height of the placement of the antenna is a critical factor in achieving this coverage. Accordingly, the uppermost sections of a communications tower, which are usually above the tops of utility poles, are more valuable and preferred by SOMA's tenants.

antennas may be up to fifteen feet in diameter.[13] This elemental difference between types of attachments, which distorts the "usable space" concept, is further evidence that the FCC strayed from Congress's intent in construing the 1996 Act amendments to the PAA.

B. No Government Regulation Of Wireless Equipment Attachment Agreements Is Necessary Or Justified.

The market for siting wireless communications attachments historically has not been subject to government regulation as it pertains to the source of siting opportunities. Nothing in the PAA, its legislative history, the FCC's public comment process leading to the *PAA Order*, or the current functioning of the market indicates that a different regulatory treatment is suddenly warranted.

First, from a competitive perspective, there is no single entity or type of entity (such as utilities) that is, or could be, a "bottleneck" for the siting of wireless communications equipment. There are simply too many available locations in which to site this equipment for a single company or type of provider to exert the monopoly power that utilities were alleged to have in the wired arena.

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[13] The inherent differences in the sizes of wireless and wired attachments account, in part, for the vast discrepancy in the size of utility poles and communications towers. Utility poles are typically of uniform height. The FCC, in applying the PAA's rate regulation scheme, presumes that a utility pole is 37.5 feet in height and contains 13.5 feet of "usable space" for attachments. *Attachment Order*, 15 F.C.C.R. at 6465-66. Towers used for wireless attachments vary considerably in height, with the tallest exceeding 2000 feet above ground and the average tower reaching 200-250 feet above ground. Virtually all of the space on a traditional tower is usable for attachments, subject to spacing between equipment necessitated by radio frequency radiation interference concerns.

Second, wireless telecommunications providers do not face unfair bargaining, nor are they forced to accept contracts of adhesion from utility companies regulated by the PAA in order to obtain access to usable sites for their wireless facilities. Indeed, because wireless providers are a primary and vital source of income for owners of communications towers and other equivalent structures, they are able to negotiate favorable lease terms and reasonable rates, as defined by the marketplace and not through government regulation.[14]

Third, wireless equipment attachments historically have been subject to far more limited and lenient regulatory treatment by the federal government. The FCC may review a proposed communications site for compliance with certain federal statutes such as the National Environmental Policy Act and the National Historic Preservation Act, *see* 47 C.F.R. § 1.1301, *et. seq.*, and the FCC's various regulations concerning radio frequency radiation and air safety, *see* 47 C.F.R. § 17.1, *et seq.*, However, the FCC traditionally has not otherwise regulated the relationship between owners of wireless equipment and owners of sites upon which to attach that equipment.

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[14] There is a stark difference between the fair market value for wireless and wire attachments. In the past year, the FCC's Cable Services Bureau has approved "just and reasonable" annual lease fees for one foot of usable space of $7.47 per pole, *Alabama Cable Telecomms. Assoc. v. Alabama Power Co.*, 15 F.C.C.R.17346 (Cable Servs. Bur. 2000), and $5.12 per pole, *Cavalier Tel., LLC v. Virginia Elec. and Power Co.*, 15 F.C.C.R. 17962 (Cable Servs. Bur. 2000). By contrast, in the experience of SOMA's members, the average monthly lease rate for a wireless equipment attachment on a traditional communications tower is approximately $1,500, with additional charges for utilities consumed by the tenant. The lease rates for traditional towers are significantly higher than the rates for wire attachments because of factors such as the cost of constructing towers, their geographic location, the number of actual and potential users of the towers, the desirability of the location of the tenant's equipment on the towers, and the identity of the attaching party.

Fourth, to SOMA's knowledge, no wireless telecommunications provider has ever complained to the FCC or sought regulatory relief due to a lack of usable sites or an inability to secure either fair market leasing rates or sufficient space on wireless siting facilities or utility poles. Indeed, it is unlikely that wireless carriers would have disposed of, and continue to sell off their tower portfolios if they believed it would result in their being subjected to unreasonable leasing rates or terms. In any event, the wireless equipment market continues to thrive and expand as the use of wireless communications devices and needs of wireless providers increases.

Neither the text nor legislative history of the PAA addresses, much less contradicts, this understanding of the market for wireless equipment siting. The *PAA Order* implementing the FCC's interpretation of the 1996 Act amendments to the PAA does not cite any evidence or public comment establishing that utilities are "bottlenecks" for wireless equipment siting or that the utilities have engaged in unfair bargaining for such attachments. The FCC's decision on this point contains little analysis at all. *See American Hosp. Assoc. v. NLRB*, 499 U.S. at 618 (noting the extensive rulemaking conducted and careful analysis of comments and well-reasoned justification of new rule undertaken by NLRB as partial grounds for upholding rule).

In light of the foregoing examination of the state of the wireless equipment siting market, the FCC's decision to extend the PAA to wireless equipment attachments stands as a remarkable refutation of market principles in favor of intrusive and far-ranging government regulation. By construing the term "any attachment" to include wireless equipment, the FCC unreasonably abandoned common sense and the historical regulatory restraint afforded this market. Consequently, no deference to this interpretation is necessary. *Chevron*, 467 U.S. at 842. *Cf. Bates v. Little Rock*, 361 U.S. 516, 525 (1960) (governmental action must bear some

reasonable relationship to achieving the governmental purpose asserted as justification for the regulation).

C. The FCC's Interpretation Of The PAA Is Inconsistent With Congress's Intent To Deregulate The Communications Industry.

The 1996 Act was a landmark statute, touching, or altering, numerious aspects of the underlying Communications Act of 1934. The 1996 Act's unifying principle is to encourage market forces and competition and abridge or abolish governmental intrusion on functioning markets. H.R. Rep. No. 104-204, at 47-55 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11-18. Congress expressed this preference for competition throughout the 1996 Act.

For example, Congress eliminated the national broadcast ownership caps and substantially relaxed the local ownership rules. Pub. L. No. 104-104, § 202 (1996) (directing FCC to adopt statutorily-imposed changes to ownership rules). In the cable arena, it established a sunset date for federal regulation of certain cable rates, clarified the right of incumbent providers to petition for a determination of effective competition to eliminate all rate regulation, Pub. L. No. 104-104, § 301 (1996) (codified at 47 U.S.C. § 543), and promoted the development of DBS and other satellite-delivered programming as competition to cable by prohibiting restrictions on the siting of over-the-air reception devices. Pub. L. No. 104-104, § 704 (1996) (codified at 47 U.S.C. § 332(c)(7)).

Most notably, Congress enacted a complex series of provisions to encourage competition in the local and long distance telephone markets by both new entrants and other companies (including cable systems and utilities). Section 257(b) of the Communications Act, adopted as part of the 1996 Act sets forth the "National Policy" on communications competition that "the [FCC] shall seek to promote the policies

and purposes of the [Communications] Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (Supp. IV. 1998). The House Conference Report explains that the 1996 Act was designed to "provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 124.

To effectuate this policy, Congress directed the FCC to identify and eliminate entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications or information services. 47 U.S.C. § 257(a) (Supp. IV 1998). Congress further ordered periodic reviews of the FCC's regulations to continue to eliminate market entry barriers and for the FCC to recommend to Congress statutory provisions that might be eliminated to encourage competition. *Id.*

As yet a further spur to competition, Congress enacted a forebearance policy, ordering the FCC to not apply any regulation or any provision of the Communications Act to "a telecommunications carrier or telecommunications service" if the FCC concludes that enforcement of the provision is not needed to ensure just and reasonable and non-discriminatory rates and practices. 47 U.S.C. § 160(a) (Supp. IV 1998). In making that determination, the FCC is required to consider whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b) (Supp. IV 1998).

Congress also enacted restrictions on the ability of state and local governments to thwart the development of new communications sites through a national wireless equipment siting policy, 47 U.S.C. § 332(c)(7) (Supp. IV 1998). Against the backdrop of this unambiguously deregulatory scheme, the FCC adopted an interpretation of the 1996 Act amendments to the PAA which has the direct effect of substantially increasing government intrusion and regulation of a market which, by all available evidence, functions effectively. The FCC's decision is unequivocally inconsistent with the general approach to competition dictated by Congress and the specific textual limitations on the scope of the PAA set forth in that statute.

CONCLUSION

For the foregoing reasons, SOMA respectfully requests that the Court affirm the holding of the Eleventh Circuit, a decision which adheres to Congress's intent as expressed in the 1996 Act amendments to the PAA, is consistent with Congress's desire to deregulate the communications industry, and respects the economic and practical distinctions between the markets for siting wireline equipment and wireless equipment.

Respectfully submitted,

DENNIS P. CORBETT
H. ANTHONY LEHV *
LEVENTHAL, SENTER
& LERMAN P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

* Counsel of Record

Counsel for the Site Owners and Managers Alliance of the Personal Communications Industry Association